UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re **DENISE E. WRIGHT,** **Debtor.** **Case No. 04-06310-A7** **GREGORY A. AKERS, Chapter 7 Trustee,** **Plaintiff,** **v.** **THOMAS GEVISS,** **Defendant.**	**Adv. Proc. No. 04-90454-A7** **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

FINDINGS OF FACT

1. Denise E. Geviss, now known as Denise Wright ("Wright" or "Debtor"),was formerly married to Thomas A. Geviss ("Geviss" or "Defendant"). Their approximate four and one-half year marriage terminated in a divorce.

2. On or about December 15, 2002, Debtor and Defendant filled out a Petition for Dissolution online, fixing December 15, 2002, as their date of separation. Debtor filed the completed Dissolution Petition on January 13, 2003.

3. On January 14, 2003, the parties executed a Marital Settlement Agreement ("MSA") designed to settle the parties' obligations as to their property and debts. [Ex. 2] As with the Petition for Dissolution, this was prepared by Debtor through use of computer-provided forms and without the assistance of legal counsel. Debtor chose the online service provider and filled out all paperwork.

4. The MSA provided *inter alia* that

A. The parties had investigated the values of their property and warranted each to the other that neither had knowledge of any fact which would affect the distribution of that property. [Ex. 2 at ¶ 9]

B. The parties' residence at 2249 Boulders Court, Alpine, CA (the "Residence") was to be refinanced by Defendant and he would pay the sum of $45,000 to Debtor who would then quitclaim title to him. [*Id.* at ¶ 15]

C. The parties agreed not to incur any further debts for which the other would be liable and that they would hold harmless and indemnify the other against any liability for debts incurred after the effective date of the agreement. [*Id.* at ¶ 16]

D. The parties owed approximately $20,000 in joint credit card debt. They agreed to split the amount in half and each pay $10,000 of the debt at the time of the refinance of the Residence. Debtor agreed she was to use $10,000 of the $45,000 she was going to receive from the refinance to do this. The parties agreed they would also cancel all credit cards. [*Id.* at ¶ 17A and ¶ 18A]

5. The MSA was filed with the Superior Court by Debtor on February 6, 2003, and a Judgment of Dissolution entered that same day.

6. It is uncontroverted that Debtor did not immediately leave the Residence on the date of separation (December 15, 2002). Rather, she remained in the Residence because she was looking for another place to live. Ultimately, some time in March 2003, Debtor moved into a house her mother was purchasing. During the time the Debtor and the Defendant continued to reside together, they conducted themselves with dignity and restraint: Debtor continued to cook meals for the family, do laundry

and pick up Defendant's daughters from school. Debtor and Defendant continued to deposit their paychecks into a joint account for the payment of joint bills. However, they did not continue a relationship of husband and wife; there were no marital relations; they did not socialize as husband and wife. To the extent any of Debtor's testimony is to the contrary, the Court does not find it is credible.

7. The usage of credit cards is an issue in this case. The Debtor and the Defendant had two credit cards: an MBNA account ending in "3695" which was initially in the name of Denise Geviss [Ex. 20]; and an MBNA account ending in "5142" in the name of Tom Geviss [Ex. 21]. Denise Geviss was an authorized signatory on the "5142" account.

A. At the time the Debtor and the Defendant filled out the Petition for Dissolution, they estimated that the total balance on these accounts was $20,000.

B. Tom Geviss testified without contradiction that on the day they filled out the dissolution petition paperwork, the parties cut up their credit cards in front of each other and agreed they would cancel them. Geviss said that Debtor later told him that she had attempted to cancel the "5142" account and that MBNA told her that Geviss would have to do so personally since he was the primary cardholder. He did so by telephone.

C. By the time Defendant obtained payoff information on the credit cards for the purpose of satisfying these debts at the time of the Residence refinance contemplated by the MSA, the balance on these accounts had increased to $27,000. It appears that Debtor obtained reissue of the cards she destroyed and continued to use them in breach of her agreement with Defendant not to incur any further debts and without Defendant's knowledge of that usage.

D. Although Debtor testified that Defendant authorized her continued use of the credit cards, the Court rejects that testimony as not credible.

E. When virtually the entire balance due on these "5142" credit card was paid off through the refinance of the Residence in May 2003, Debtor directed the

credit card statements to her new address. Without Defendant's knowledge, Debtor continued to use the "5142" card. At the time of filing her bankruptcy, the "5142" card had a balance of over $19,000. Similarly, after payment of a substantial amount of the "3695" credit card balance in May 2003 – the card Debtor represented she had cancelled – she directed the statements be mailed to her new address. Debtor continued to use that card without Defendant's knowledge and had a balance of approximately $18,500 at the time she filed her petition. The Court finds these charges by Debtor were unauthorized by Defendant. Defendant is now being pursued by MBNA for payment of both balances.

8. At the time of filling out the MSA, the Debtor obtained an estimate of the value of the Residence. A realtor friend of hers told her that the residence had approximately $90,000 in equity. Accordingly, the MSA provided that she was to get $45,000 from a refinance in Defendant's name alone and quitclaim the residence to him.

The Residence was unable to be refinanced in Defendant's name alone as contemplated by the MSA. He had insufficient income to qualify in his own right. He approached Debtor about remaining as a co-obligor on the refinance for a one year period at which time he would refinance again, using his father as co-obligor. Debtor agreed as she desired to get the $45,000 cash out of the residence and did not wish to force Defendant to sell the house. There was no agreement that additional consideration was to be paid for this accommodation.

There was no evidence produced by Debtor that she paid any of the payments or other associated expenses (*e.g.*, taxes, insurance, maintenance, etc.) of owning the Residence after the refinance. Indeed, Defendant testified that he purchased mortgage insurance on himself to protect her from having to bear any mortgage expense should he die before paying off the obligation.

9. In late January 2003, Debtor purchased a car which she financed with California Coast Credit Union ("CCCU"). Defendant testified that he had no

knowledge Debtor was going to purchase a car; she had been driving a vehicle leased through his business. His testimony is credible on this point. At the time the Residence was re-financed as agreed in the MSA, CCCU was paid $19,418 from escrow. This paid the debt on the new vehicle in full. There is no mention in the MSA of the new vehicle as a community asset assigned to Debtor.

10. The Residence was refinanced in May 2003. The settlement statement shows the parties received $46,896.00 net distribution from the refinance. [Ex. 14]

11. Attachments D-1 and D-2 to Exhibit 19 are accountings prepared by Debtor in consultation with Defendant. These accountings represent their attempt to dispose of the refinance proceeds in accordance with the MSA and other agreements between them. Debtor testified that these were not the final versions of the accountings; Defendant testified that these were the only versions he was given by her. The Court rejects Debtor's testimony as not credible to the extent she attempts to disavow these accountings as the agreement of the parties.

12. Attachment D-1 indicates that Debtor was to receive $45,000 from the residence refinance out of which she agreed to pay $10,000 of the $20,000 in community debt on credit cards and $21,000 on her car loan with CCCU. Attachment D-2 apportions responsibility for their joint income tax liability as well as the unanticipated credit card balance increase of almost $8,000. In Attachment D-2, they agree that Debtor is owed $9,270 which is paid, in part, by services rendered to her father ($500 for the motor home repairs), in part, by miscellaneous adjustments concerning their checking account ($675), in part, by a credit from Debtor to Defendant for his separate property business Action Turbo ($3,000), leaving a net balance owing to her of $5,095.00. This is the amount which remained unpaid after refinance of the residence for purposes of performing the MSA.

13. Defendant testified without contradiction that he "worked off" the balance due Debtor by performing labor on her new home. He testified in detail about purchasing the materials and performing all the labor necessary to install a sprinkler

system and construct a wooden fence over a six-month period of time. He estimated that he spent over $2,000 in materials alone. At the conclusion of this, Defendant and Debtor agreed he owed her nothing more under their MSA.

14. Defendant testified that in May or June 2004, he attempted to refinance the residence again to remove Debtor from title. He approached the same lenders procured by Debtor for the prior refinance. When a credit check was performed, he discovered that he was shown to be liable on the credit card debt referenced in paragraph 7.E. above. He states he was advised that refinance of the residence again would not be possible unless he paid off the credit card debt which he was unable to do.

15. Defendant decided to sell the residence. He requested and obtained from Debtor a Grant Deed placing the residence in his own name. The deed was recorded on June 10, 2004. [Ex. 16]

16. On July 15, 2004, Defendant accepted an offer to purchase the residence. [Ex. 17] He testified that he was required to perform significant repairs to the residence before the sale closed, which repairs he values at $20-25,000 in materials and labor. On August 31, 2004, the sale closed. [Ex. 18] It is an admitted fact that the Defendant received $237,823.83 in net proceeds from the sale of the residence. [Ex. 3 at p.5; Ex. 4 at p. 2] Debtor received no distribution from the sale of the residence.

17. On July 16, 2004, Debtor filed Chapter 7 bankruptcy. Gregory A. Akers was appointed her Chapter 7 Trustee. On October 20, 2004, the Trustee filed an action to avoid an alleged fraudulent conveyance and for breach of the MSA.

18. By Order entered October 18, 2005, this Court entered partial summary judgment against Defendant and in favor of Trustee, reserving for decision after trial certain issues addressed herein.

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CONCLUSIONS OF LAW

1. The adversary proceeding arises out of and relates to the Debtor's chapter 7 case. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334 and General Order 312-D of the United States District Court for the Southern District of California.

2. The Trustee's avoidance claim is a core matter under 28 U.S.C. § 157(b)(2)(A) and (H); the Trustee's breach of contract action is a non-core related matter which the parties have agreed may be disposed of as a core matter. [*See* Complaint filed Oct. 20, 2004 at ¶ 6; and Answer filed Nov. 9, 2004 at ¶ 6]

3. By the Order granting partial summary judgment, the Court ruled that Debtor retained an interest in the Residence which she transferred with the Grant Deed to Defendant; Debtor's transfer of her interest in the Residence by the Grant Deed occurred within weeks of filing bankruptcy; the transfer rendered Debtor insolvent; and Debtor received no proceeds from the sale of the Residence. The Court reserved for determination at trial the nature and value , if any, of Debtor's interest in the Residence at the time she executed the Grant Deed transferring her interest. [Doc. # 25 at ¶ 1.a.-d. and ¶ 2.b.]

4. Upon consideration of the facts adduced at trial, the Court concludes the Debtor had merely bare legal title and no equitable interest remaining in the Residence at the time she executed the Grant Deed, having previously received the reasonably equivalent value of her interest in the property. In ruling, the Court has applied the state law presumption of record title set forth in California Evidence Code § 662. This section provides:

> The owner of legal title to property is presumed to be the owner of the full beneficial title. This presumption can be rebutted only by clear and convincing evidence.

See also In re Marriage of Haines, 33 Cal. App. 4th 277, 291 (1995)(recognizing that record title is usually determinative of the ownership of real property, unless there is a statute or the ownership interests are otherwise established by the evidence).

The Court concludes the presumption of record title has been rebutted by the evidence. As more fully set forth above, the Court finds that Debtor and Defendant agreed in the MSA that Defendant would refinance the Residence, cash out Debtor's community interest and Defendant would take title in his own name. The parties never altered these fundamental terms of the MSA. When by reason of circumstances beyond their control, Defendant could not refinance the residence in his own name, Debtor agreed, as a temporary accommodation and in furtherance of the MSA terms, to remain on title even though Defendant cashed out her interest. Debtor made no payments on the Residence and bore none of the expenses of the Residence during the interim until she deeded her interest to Defendant. Debtor made no demand for additional proceeds from Defendant as consideration for this temporary accommodation, either at the time she did it or at the time she deeded the Residence to Defendant. The evidence is so clear and convincing that it leaves no substantial doubt in the Court's mind that Debtor held only bare legal title to the Residence as a result of the MSA.

5. The term "reasonably equivalent value" is not defined in the Bankruptcy Code. The courts are left to determine the scope of the term. *Matter of Besing*, 981 F.2d 1488, 1494-95 (5th Cir. 1993). In determining whether a debtor received reasonably equivalent value, it is appropriate for bankruptcy courts to use their equitable powers to delve behind the transaction and the relationships of the parties to determine the transaction's true substance. *In re United Energy Corp.*, 944 F.2d 589, 596 (9th Cir. 1991). The analysis is directed to what the debtor surrendered and what the debtor received, irrespective of what a third party may have gained or lost. *United Energy*, 944 F.2d at 597.

With the above standard in mind, the Court has delved behind the Grant Deed transaction to determine whether reasonably equivalent value was exchanged for the Debtor's interest at the time she deeded her interest. The Court concludes reasonably equivalent value was exchanged because Debtor held only bare legal title to the

Residence at that time. Debtor's equitable interest in the residence was previously cashed out, and she remained on title only as a temporary accommodation to Defendant so he could qualify for the refinancing to cash her out.

The Trustee does not claim the $45,000 valuation of Debtor's community interest was inequitable at the time of the MSA; nor is there any evidence of bad faith by Defendant. Accordingly, the evidence does not support avoiding the Grant Deed as a fraudulent conveyance. *In re Roosevelt*, 220 F.3d 1032, 1040 (9th Cir. 2000)(recognizing a bankruptcy trustee may set aside a good faith allocation of marital property only to the extent that the non-debtor spouse received more than the debtor).

6. The Trustee also seeks damages for breach of the MSA. However, the Trustee must step into the Debtor's shoes in asserting this claim. The Trustee has no greater rights than the Debtor had against the Defendant. *In re Gendreau*, 191 B.R. 798, 802 (9th Cir. BAP 1995). In the instant case, the Court finds Defendant performed the "spirit" of the MSA to best of his abilities; that Defendant "worked off" the $5,095.00 balance Debtor was still owed after they reconciled the disposition of the refinance proceeds; and that Debtor agreed the Defendant owed her nothing more under the MSA. [FF 11-13]

7. Additionally, the Trustee's breach of contract claim is problematic because the Debtor was the *first* to breach the MSA. The evidence shows Debtor and Defendant cut up their credit cards in front of each other on the day they filled out their dissolution paperwork and they agreed to cancel them. [FF 7.B] They expressly reaffirmed this agreement in the MSA. [Ex. 2 at ¶16 ("the parties agree not to incur any further debts or obligations for which the other party may be liable); ¶ 17.A. ("[a]ll credit cards will be cancelled.")] Notwithstanding, Debtor continued to make significant additional charges on their credit cards and she purchased a brand new car in breach of the MSA.

Trustee argues Defendant breached the MSA because he was jointly liable for Debtor's additional unauthorized debts. Therefore, Defendant's use of the refinance proceeds to pay these additional debts did not count toward the $45,000 he owed Debtor for her community share of the residence. Trustee cites Family Code § 910 in support of his argument that the additional, unauthorized debts were community debts.

The Court rejects this argument. Family Code § 910 determines the character of debts as community debts or separate debts when there is no mutually agreed upon date of separation. *See Norviel v. Norviel*, 102 Cal. App. 4th 1152, 1158 (2002)(indicating the significance of determining the date of separation lies in the fact that it dictates the character of property acquired thereafter). Unlike *Norviel*, in this case Debtor and Defendant mutually agreed the date of separation was December 15, 2002. There is no evidence they changed this agreement; nor did either side ever move to have this agreed upon date set aside. *Compare Norviel*, 102 Cal. App. 4th at 1156 (wherein the wife moved to set aside their agreed upon date of separation, and the issue of the date of separation was bifurcated for trial). The agreed upon date of separation is stated in the dissolution petition and incorporated into the final dissolution judgment. The Court is not persuaded it should disturb this date.

8. Trustee seeks to recover his attorney's fees and costs incurred in this adversary proceeding, plus 10% interest commencing from October 20, 2004. Trustee did not prevail on his breach of MSA claim so he is not entitled to an award of his attorney's fees and costs. [Ex. 2 at ¶ 29] Likewise, Defendant is not entitled to an award of his attorney's fees and costs under the terms of the MSA; nor is he entitled to such an award as the "prevailing party" in the action. Defendant did not strictly comply with the terms of the MSA; although he did ultimately pay Debtor the equivalent of the $45,000 she was entitled to be paid. Defendant and Debtor agreed all amendments to the MSA would be in writing; yet neither side ever complied with this term. The failure to comply with this provision triggered the Trustee's claims for

fraudulent conveyance and breach of the MSA. The Court will not condone the Defendant's inaction by awarding his attorney's fee and costs to defend this action.

Dated:_____

_____
LOUISE DE CARL ADLER, Judge

CAD 168
[Revised July 1985]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

Adv. Proc. No. 04-90454; Case No. 04-06310
Case Name: In Re: DENISE E. WRIGHT;
AKERS v. GEVISS

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the Office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to-wit:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

was enclosed in a stamped and sealed envelope and mailed to the following parties at their respective addresses listed below:

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The envelope(s) containing the above document was deposited in a regular United States mail box in the City of San Diego in said district on February 16, 2006

_____ _____,
CAD 168 Roma London, Deputy Clerk